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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The central theme advanced by both Respondents and the United States and the Equal Employment Opportunity Commission (hereinafter referred to as the "Amici") is that Respondents Smith and Samuels were victims of purposeful discrimination. This is premised on the argument that since both had previously worked for Dacies, their exclusion from Dacies' so-called "list" constituted racial discrimination. The record, however, does not support this contention. Rather, it reveals that Samuels had, in fact, never worked for Dacies. In addition, Smith was hired precisely because he was known by Dacies and was treated precisely as were white bricklayers purportedly on

Dacies' "list." In actuality, neither was a victim of discrimination, purposeful or otherwise.

The Amici make no other contentions and fully agree with Petitioner that Furnco's hiring policies were proved legitimate and nondiscriminatory. The Amici further admit that the Seventh Circuit erred in finding that Furnco had discriminated against Nemhard, and concede that the Seventh Circuit was wrong in finding Furnco's hiring policies, particularly its refusal to accept applications, violative of Title VII.

In contrast to the Amici, numerous other theories are advanced by Respondents. Principally, however, they hinge on claims wholly without support in the record. At will, Respondents distort, selectively cull and fabricate facts, apparently adhering to the view that any assertion—however erroneous or not contained in the record—will be accepted if asserted vigorously and repeatedly enough.

If intemperate, the foregoing is nonetheless entirely accurate. At this late date, such tactics clearly put Petitioner to the task of having either to refute Respondents' erroneous factual assertions point-by-point or appear to treat them as true. Although Petitioner hopes to respond to the major factual errors contained in Respondents' Brief,[1] Petitioner respectfully urges this Court not to interpret as assent our silence as to any factual claims raised by Respondents which are at odds with either our prior Statement of the Case or the District Court's findings.

1. In this regard, we have also prepared an Appendix of Errata at the end of this Reply Brief, contrasting other factual claims asserted by Respondents, not central to our reply, with the actual record. We have done so to avoid unduly lengthening the text of this Brief and to assure that this Court is fully apprised of the record in this case.

ARGUMENT.

I. NEITHER SAMUELS NOR SMITH WERE VICTIMS OF PURPOSEFUL DISCRIMINATION.

A. Donald Samuels.

Both Respondents and Amici assert that Samuels had worked for Dacies on a prior Furnco job and hence his exclusion from Dacies' purported "list" constitutes purposeful discrimination (Respondents at 6, 16-20; Amici at 13, 16-17).[2] Both are, however, plainly wrong. There is no evidence whatsoever in the record supporting this assertion; indeed, the record is absolutely crystal clear that Samuels had never worked for Dacies. Thus, Samuels testified unequivocally (R. 266):

> "Q. [By Mr. Kaplan] Had you ever worked for Joe Dacies?
>
> "A. [By Samuels] No, I had not."

Both try to surmount this obstacle by asserting (without any reference to the record) that, although Samuels had never worked for Dacies, they worked on the U. S. Steel job together in 1969 (Respondents at 6, n. 10; Amici at 5). On the contrary, the record evidence is that Samuels was hired *after* Dacies was no longer working on the U. S. Steel job. In Defendant's Answers to Plaintiffs' first Interrogatories, filed with the District Court on February 16, 1973, the answer to question 7(c) shows that Dacies worked on the U. S. Steel job only until September 9, 1969. Similarly, the Answers to Interrogatories as to bricklayers employed on that job (Attachment Answer to Interrogatory

2. References to the Respondents' Brief shall be made as (Respondents at .....), to the Brief of the United States and Equal Employment Opportunity Commission as (Amici at .....), and to Petitioner's prior Brief as (Petitioner at .....). References to the Appendix of Errata at the end of this Reply Brief shall be made as (Errata at ¶ .....).

No. 8) demonstrate that Samuels did not begin work on that job until September 10, the day after Dacies left that job. Plainly, the record evidence is that Samuels had never worked for or with Dacies and hence his claim is indistinguishable from Nemhard's.[3]

B. William Smith.

The crux of both Respondents' and the Amici's claim with regard to Smith is that he was denied equal employment opportunity because he was excluded from Dacies' purported "list" of bricklayers.[4] Petitioner submits, and will argue *infra,* that even if such exclusion occurred, Smith was not the victim of employment discrimination insofar as presence on the alleged "list" was not a prerequisite for employment on the Interlake job. However, before turning to this argument, two important factual issues completely misstated by Respondents and the Amici must be clarified.

First, Respondents assert that, prior to the Interlake job, and particularly on the U. S. Steel job performed by Furnco in 1969, "every black bricklayer hired by Furnco obtained employment by applying at the job site" and that this was how Smith obtained employment on that job (Respondents at 4, 9-10).[5] The record is, however, to the contrary. As testified to by Smith, Furnco specifically sought him out to work on that job.

3. That Samuels had previously worked for Furnco is, in this respect, totally irrelevant. Both Respondents' and Amici's claim is based on the assertion that Samuels, having worked for Dacies, was discriminatorily excluded from his "list." Having never worked for Dacies, plainly Samuels was not so discriminated against. To be sure, he had previously worked for Furnco, but then, as a comparison of the bricklayers employed on the U. S. Steel and Interlake jobs performed by Furnco reveals, so had numerous white bricklayers who also were not offered employment on the Interlake job.

4. By no means does Petitioner concede the existence of such an "all-white list." As noted previously, the pool of bricklayers from which Dacies hired on this job was integrated (Petitioner at 34).

5. This assertion is the cornerstone of Respondents' claim that Furnco maintained a dual hiring system (Respondents at 4-5, 20-26, 33-35). Smith's testimony reduces this claim to rubble.

Thus, Smith testified as to how he got to be hired on the U. S. Steel job (R. 346, 366):

> "Waters called me up and said that Mr. Larkin [Furnco's assistant superintendent on the U.S. Steel job] had asked for me and wanted to know how come I hadn't been out to the job, and I said, 'Well, I have a job.' And I said I didn't want to get back into firebrick because it was too hard getting a job. I have got a family to take care of and I can't run around from job to job trying to get work.
>
> So Waters said, 'Well, he asked for you. Come on out.'
>
> So I went out that morning and saw Charlie Larkin and he said, 'Go ahead and come to work.'
>
> "Q. [By Mr. Kaplan] So Mr. Larkin had in fact specifically sought you out because you had worked for him before?
>
> "A. Yes.
>
> "Q. And, in fact, you came out to the job site knowing you would have a job on that day?
>
> "A. I came out to the job site and he hired me right away.
>
> * * * * *
>
> "Q. So, in fact, you didn't have to wait around the gate. You didn't even have to apply, you came and you got a job.
>
> "A. Yes, I did."

Second, both Respondents and the Amici assert that Smith was a plaintiff in the *Batiste* litigation[6] and that when settlement

6. *Batiste* arose from Furnco's failure to hire several black bricklayers on the U. S. Steel job in 1969. Smith was hired by Furnco on that job and so had no such claim. Before the Illinois Fair Employment Practices Commission, there were six charging parties—Narcisse Batiste, Charles Temple, Sylvester Williams, Percy Wilson, Vandy Hawkins and Raymond Pendarvis. An FEPC Hearing Officer found that Furnco had not engaged in discrimination. His finding was reversed by the FEPC, whose decision in turn was reversed by the Circuit Court which affirmed the Hearing Officer's decision. *See Furnco* v. *Illinois FEPC,* 71 L 12194 (Cook County Cir. Ct. 1976). A companion federal claim concerning five of the State charging parties—all but Percy Wilson—was also brought. *See Batiste* v. *Furnco,* 350 F. Supp. 10 (N. D. Ill. 1972), *rev'd,* 503 F. 2d 447 (7th Cir. 1974), *cert. denied,* 420 U. S. 928 (1975). In none of these actions was Smith either a charging party or plaintiff.

negotiations broke off, he was hired by Dacies at Furnco's General Manager Wright's direction (Respondents at 8, n. 16, 20; Amici at 6). These assertions are completely without foundation in the record. Smith was never a party to the *Batiste* litigation, any settlement negotiations or a subject of any conversation between Wright and Dacies.

For example, Respondents' amended complaint which alleges in Count II a claim of retaliation stemming from the *Batiste* suit does not refer to Smith as a plaintiff in that suit or as being a part of those negotiations (A. at 13, ¶¶ 7, 8).[7] Indeed, if Smith was a party to the *Batiste* litigation, it would certainly come as a surprise to him, since in his sworn answer, filed with the District Court in June 1974, to one of Furnco's Interrogatories, Smith stated:

> "INTERROGATORY No. 18: During the years 1962 through and including this date, were you party to or witness in any proceeding, including lawsuits in any court (Federal or State), or before any administrative agency (Federal or State) or any other tribunal or investigative body involving, relating to, or against FURNCO CONSTRUCTION CORPORATION?
> "ANSWER: No."

All this is critical not only as it corrects the assertion that Smith was hired at Wright's insistence,[8] but more importantly as it relates to why Smith was hired on the Interlake job. Thus, the record is unmistakable that, like the white bricklayers purportedly on Dacies' "list," Smith was hired because he had worked for and was known by Dacies. Moreover, the evidence plainly

7. The sole mention of Smith in this retaliation count is that he "went to Furnco's Interlake job site with some of the named plaintiffs to seek employment." (A. at 13, ¶ 9.)

8. We would note that neither Respondents nor Amici make a reference to any portion of the record supporting this assertion. There is none. Rather, although Dacies testified that Wright had given him the names of several black bricklayers (R. 779) and later recounted which ones he had hired (Hawkins—R. 783; Pendarvis—R. 785; Williams—R. 785-86; Wilson—R. 786), Smith's name was not included among those Dacies hired in this manner (R. 785).

shows that Smith was not disparately treated vis-a-vis white bricklayers and that the date of his hiring on the Interlake job was not the product of racial discrimination, but was the product of a random and nondiscriminatory sequence of selection.

The record reveals that some time after the Interlake job had started, Dacies met Smith at the job site.[9] As Dacies testified (R. 786-87):

> "Q. [By Mr. Kaplan] At any time, do you ever remember meeting William Smith around the gate area?
> "A. [By Mr. Dacies] Yes, I did, on one occasion.
> "Q. Would you tell us about that? Do you remember when that was?
> "A. I don't remember the exact date, what it was. I was leaving the premises, and he was out there. I mentioned the fact, *I said, 'What are you doing here? You are going to get a job when I'm ready to increase the forces.'* I was very much surprised that he was out there, and that was the course of the conversation *and then eventually I did hire him, because I knew him.*" (Emphasis added.)

The District Court credited Dacies' testimony, finding (C. A. at A17; Findings ¶ 14):

> "The only such person Dacies spoke to at the gate area was Smith who had worked for Dacies previously. Dacies told Smith that he had intended to contact Smith for the job. Smith was, in fact, subsequently hired. . . ."

At the time Smith met Dacies, Smith did not even give Dacies his phone number because, as Smith testified, he had worked for Dacies on previous occasions (R. 329).

The core of the claim regarding Smith is that his purported exclusion from Dacies' so-called "list" constituted discrimination because he was hired later than he otherwise would have

9. Respondents claim that this meeting occurred in August (Respondents at 20). The record cited by Respondents (R. 871) does *not* refer to August. In fact, neither Dacies (R. 787), nor Smith (R. 354) could remember the date.

been.[10] In fact, although Smith was hired on October 12, he had been contacted some three weeks earlier by Dacies to come to work, but was not put to work at that time because of problems with the progress of the job precluding the hiring of additional bricklayers. As Smith testified (R. 350-51):

> "Q. [By Mr. Kaplan] Now, approximately three weeks before that, that would be around the 20th of September, it is your testimony that Mr. Dacies called you and told you to come out to work, but then when you got there he said, 'Look, we have a problem. We are not putting any more bricklayers on.
> "A. [By Mr. Smith] That is right.
> "Q. Was there any reason for you to disbelieve him?
> "A. No, at the time there wasn't.
> "Q. Now is there any reason?
> "A. No, there was a problem.
> * * * * *
> "Q. So in fact you were called about three weeks prior the time you were actually hired and the reason that you were not put to work immediately was that there was a problem, but you were subsequently put to work on October 12th?
> "A. Yes."

Once being hired on the job, Smith testified that he was treated "the same as everybody else . . . the same as the white bricklayers." (R. 345.)[11] In fact, after being laid off as part of the general decrease in the work force, he was called back by Dacies for a few extra days of work (R. 351).

The notion that Smith's purported exclusion from Dacies' "list" denied him an equal opportunity for work on the Interlake job is plainly wrong. Critically, seven white bricklayers, all of

10. Both Respondents (Respondents at 10, 19, 20) and Amici (Amici at 6, 10) contend that if Smith were on Dacies' so-called "list," he would have been hired sooner than he was. Neither, however, cites to any record evidence supporting this contention.

11. Smith admitted that in the many years he had known Dacies, that Dacies had never exhibited any racial prejudice toward him (R. 345).

whom were on Dacies' purported "list," were hired after Smith (Jt. Ex. 2; R. 451). And, Smith worked longer on the job than 11 white bricklayers (Jt. Ex. 2; R. 451). Equally important, as conceded by the Amici (Amici at 22, n. 16), and as is beyond dispute, black bricklayers were hired throughout the job (Def. Ex. 22; R. 621-22) and worked, on the average, the same number of days as did white bricklayers (Petitioner at 44).

The record facts surrounding Smith's employment and sequence of hiring vividly illustrate that absence from Dacies' purported "list" was not a barrier to the hiring of black bricklayers who were known to Dacies. The fact that Dacies had Smith's name in his head rather than on a piece of paper did not adversely affect Smith or any other black bricklayers known to Dacies. The record clearly shows that Dacies knew the names of black bricklayers prior to the Interlake job and hired them for that job.[12]

Respondents' focus on Smith's purported exclusion from Dacies' "list" is nothing more than a restatement of their position that the hiring process should be broken down into its subparts.[13] The claim that Smith's alleged exclusion constitutes even a *prima facie* case of employment discrimination is mis-

12. The record shows that Dacies knew James Branch (R. 781), R. D. Jones (R. 783) and William Smith (R. 785), all black bricklayers, all known to Dacies prior to the Interlake job, and all hired on that job. Although he may not have had their phone numbers or addresses, he obtained them from another Furnco superintendent in the area, Al Urbanski (R. 778). Dacies also obtained from Urbanski the names of other qualified black bricklayers whom he hired (R. 777-78, 781-86).

13. The Amici's position on this issue bristles with tension. On the one hand, they argue that Smith's exclusion from the "list"—irrespective of his actual hiring and consideration of Furnco's hiring policies as a whole—constitutes discrimination. On the other hand, they admit, vis-a-vis Nemhard, that the proper inquiry is to Furnco's entire hiring system taken as a whole, conceding the complete absence of disparate impact. For the Amici to isolate one source for the recruitment of bricklayers, *i.e.*, the purported "list," when that source was not the exclusive avenue to obtain employment, is at odds with the proposed uniform federal guidelines, as well as relevant case law (Petitioner at 33-39).

taken because this alleged exclusion caused him no injury whatsoever. Presence on or absence from Dacies' alleged "list" was not the *sine qua non* for being hired, as evidenced by the fact that Furnco hired numerous black bricklayers who were, according to Respondents, not on Dacies' "list." The purpose of Title VII is to protect the employment opportunities of minorities and the evidence here conclusively shows that Smith's opportunities for employment on the Interlake job were in no way inhibited by his purported exclusion from Dacies' "list."

To turn the question around, on what date should Smith have been hired? Neither Respondents nor Amici tell us because there is no answer. The immutable fact of hiring on a construction job, as at issue here, is that bricklayers are hired on a staggered basis as the job progresses and, like picking names from a hat, some are chosen sooner than others. Smith was hired before and worked more days than some bricklayers—both black and white—and was hired after and worked fewer days than others—similarly both black and white. There is no showing that his sequence of hiring was attributable to his exclusion from the alleged "list" or that those purportedly on the "list" were, as a group, preferentially treated. Significantly, the Amici specifically eschew any such claim (Amici at 22, n. 16).

Both Respondents and Amici assert that Smith's alleged exclusion from the "list" constitutes a case of individualized purposeful discrimination. But, as this Court held in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804 (1973), "especially relevant" to such a claim is the treatment of similarly situated whites. In this case, Smith was treated indistinguishably from white bricklayers, many of whom were hired after and worked fewer days than him. Further, Smith's date of hire must be viewed in the context of the Interlake job where black bricklayers were hired in excess of their availability in the relevant labor market, and worked, on the average, the same number of days as whites.

In this regard, the Tenth Circuit decision in *Olson* v. *Philco-Ford*, 531 F. 2d 474 (10th Cir. 1976), is particularly apposite. That case concerned whether the promotion of a qualified man over a qualified woman, in the absence of any evidence of pretext or statistical disparity, constituted sex discrimination. In rejecting such a contention, the Tenth Circuit held, 531 F. 2d at 478:

> "We do not believe . . . the law to be that in every instance when a qualified man and a qualified woman compete for a single opening, the selection of one over the other makes out a prima facie case. If such was the intent of *Rich* [v. *Martin Marietta*, 522 F.2d 333 (10th Cir. 1975)] we disagree with it. The facts in *Rich* are not comparable to those in the instant case. There, a substantial showing was made of the differences between the promotions of minority employees and non-minority employees. . . . Here we have no such proof. To make a prima facie case in a situation such as that before us something more is needed than proof that a qualified male was chosen over a qualified female. If nothing more is needed, we have indeed opened Pandora's box."

Equally apposite is this Court's holding in *International Brotherhood of Teamsters* v. *U. S.*, 431 U. S. 324, 97 S. Ct. 1843, 1866, n. 44 (1977), that "An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based."[14] So too, Smith's

14. Reference to n. 44 of this Court's decision in *Teamsters* is important as it relates to the issue of intent and motive in this case. Therein, this Court noted that "absent other explanation" a refusal to hire a minority applicant other than on the basis of lack of qualifications or absence of a vacancy is sufficient "to create an inference that the decision is a discriminatory one." Here, of course, Furnco has put forward numerous "other explanation[s]" to explain the failure to hire two Respondents and the date of Smith's hiring. In such circumstances, the Respondents clearly have the burden, under *McDonnell Douglas*, of showing that such explanations are pretextual, which they plainly have not. One final point should be made. Neither Respondents nor Amici muster much of a response to our argument regarding the necessity for a showing of discrimina-

(Footnote continued on next page.)

date of hire in the context of (1) a random and nondiscriminatory sequence of hiring, (2) where blacks worked, on the average, the same number of days as whites and (3) where black representation on the job far exceeded its statistical presence in the relevant work force, was plainly not racially based.

Effectively then, the assertion that Smith should have been hired earlier is nothing more than to assert that Furnco had to hire at the gate, precisely what the Amici have said that we were entitled not to do, a policy the Amici admit was legitimate and nondiscriminatory (Amici at 19-25). Surely, once the Amici admit that Furnco could refuse to hire at the gate, and hire persons known by its superintendent to be experienced and competent in the highly skilled work required, and once they admit both an absence of disparate impact and that the sequence of hiring of bricklayers was nondiscriminatory (Amici at 22, n. 16), the Amici's claim that Smith was the victim of purposeful discrimination will not withstand scrutiny.[15] As for the Respondents' position, we will now turn to it.

II.

FURNCO'S HIRING POLICIES WERE LEGITIMATE AND NONDISCRIMINATORY AND DID NOT DISPARATELY AFFECT BLACK BRICKLAYERS.

The Amici and the Respondents disagree as to the legitimacy and nondiscriminatory nature of Furnco's hiring policies. The Amici concede that Furnco's hiring policies on the Interlake

(Footnote continued from preceding page.)
tory intent or motive as part of the *prima facie* case under *McDonnell Douglas*. At the core of *McDonnell Douglas*, however, is the question of whether subjective decisions in individual cases of hiring, discharge, promotion and the like are color blind. In the context of Smith's sequence of hiring, such a showing of discriminatory intent or motive is necessary to establish a nexus between his hire date and his race. Without such a nexus, no racial discrimination has been shown.

15. The Amici claim that Smith had once supervised Dacies (Amici at 13). The record does not support that assertion.

job were both legitimate and nondiscriminatory and, contrary to Respondents, had no disparate impact on blacks. As such, the Amici concede that Respondent Nemhard has no claim (Amici at 19-26) and that the Seventh Circuit's decision was clearly wrong. As we have demonstrated that Samuels had never worked for Dacies, so too would the Amici have to concede that Samuels has no claim either.[16]

We are thus left with Respondents' claims. We would note initially that Respondents do not in any way respond to our position that the hiring of persons known to be experienced and capable in firebrick work by the job superintendent or recommended to him as such was a proper criterion for hiring. To the many cases cited in our initial Brief (Petitioner at 22-23) regarding this, we would add a decision of the National Labor Relations Board, *Alvis Fuller, d/b/a Lewisville Flooring Co.*, 108 NLRB 1442 (1954), where in rejecting a claim of discrimination based on an employer's refusal to hire a union activist, the NLRB held, 108 NLRB at 1444:

> "The pattern of new hirings by the Respondent after Culp's application for work shows a preference for applicants who were present or former employees, or who had the recommendations of Plant Manager Taylor. We can find no taint or suspicion of discrimination in these hirings. . . . It is most natural for an employer in filling job vacancies to prefer former employees whose qualifications are known to him, or applicants who have the personal endorsement of a top management official, over a total stranger like Culp." (Footnote omitted.)

What is singularly lacking in Respondent's position herein is any notion of how Furnco should have hired on this job. There is no evidence that hiring at the gate would have met Furnco's

16. What we have said about Respondent Smith in the prior section should also dispose of any claim by the Amici regarding him. As we have demonstrated, Smith's purported exclusion from the "list" did not in any way lead to any disparate treatment. Rather, he was treated precisely as were white bricklayers who had previously worked for Dacies.

legitimate business needs and, critically, no evidence whatsoever that it would have resulted in either nondiscriminatory hiring or more blacks being hired. Statistically and historically, quite the opposite is true.[17] And, Respondents were utterly unable to prove at trial that the *only* persons who sought work by attempting to apply at the gate were black.[18] Finally, Respondents never even attempt to uphold the Seventh Circuit's view of how Furnco should have hired on the Interlake job. This is hardly surprising in light of the numerous defects in such a system (Petitioner at 26-33).

A. Respondents Continue to Ignore the Absence of Disparate Racial Impact.

The thrust of Respondents' claim is that Furnco was required to take applications and that its failure to do so constituted racial discrimination.[19] Respondents do not cite a single case for this proposition. Rather, this claim is divined from what Respondents assert underlies Title VII and that failure to accept applications is *per se* a denial of equality of opportunity.

But as this Court has emphasized repeatedly, the threshold inquiry as to whether or not there has been equality of opportunity in hiring is an analysis of the results of the hiring system. The results of Furnco's hiring policies on the Interlake job, as

17. Petitioner at 28-30.

18. *See* Errata at ¶ 8.

19. Respondents also allege that Dacies maintained a form of secret "referral system" (Respondents at 30-32) although they earlier concede that, even in their view, this was not *per se* unlawful (Respondents at 26). The evidence in this case reveals that two bricklayers, and only two, were hired by referral from Furnco employees on the job, one black (Theodore Alston—R. 781) and one white (Stanley Nykiel—R. 784). In light of this and the overall hiring statistics on the Interlake job, Respondents' reliance on *Local 53, Int'l. Ass'n. of Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969), is singularly misplaced. Finally, Respondents' claim that Furnco hired bricklayers on this job through a secret referral system is totally at odds with their claim that an "all-white list" was used.

even the Amici admit, is that there was no disparate racial impact.

In the absence of such impact, Title VII does not require an employer to maintain any particular form of "open" hiring system. Thus in *Gresham* v. *Chambers*, 501 F. 2d 687 (2d Cir. 1974), the Second Circuit was confronted with the question of whether a college president in appointing members to his staff had to "use open recruiting as the method of selection." 501 F. 2d at 688. In dismissing a claim of discrimination based upon such a lack of open recruiting, the Second Circuit held, 501 F. 2d at 691-92:

> ". . . Only upon a showing of unlawful discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting. . . . However, absent such a showing, word-of-mouth recruiting will not be barred.
>
> "In the present case appellant has failed to prove that a pattern of discrimination against blacks existed at the College. On the contrary the evidence established, and Judge Dooling found, an absence of any such discrimination, purposeful or otherwise."

Similarly, in *Roman* v. *ESB, Inc.*, 550 F. 2d 1343, 1354 (4th Cir. 1976), the Fourth Circuit found that in the absence of evidence that a policy of not posting job openings for promotions had a disparate impact on the promotion of blacks, that the company's failure to post such openings did not constitute racial discrimination.

And, in *Presseisen* v. *Swarthmore College*, ____ F. Supp. ____, 15 FEP Cases 1466, 1495 (E. D. Pa. 1977), the claim that a closed recruiting system for college faculty members constituted sex discrimination was rejected, the court holding:

> "Thus, evidence that the College recruited by the 'old-boy network' and that it failed to regularly advertise openings would be highly probative if coupled with evidence that Swarthmore hires very few women to be faculty members. On the other hand, such evidence would be entitled to little

> weight if, notwithstanding the informal recruiting procedures, the College had a fair representation of women on the faculty. Since we have already concluded, in the previously discussed Hiring Overall section, that Swarthmore does not regularly and routinely discriminate against women with respect to hiring, *a fortiori*, Swarthmore does not regularly and routinely discriminate against women with respect to recruitment."

The evidence is unmistakable that Furnco's hiring system, however Respondents want to characterize it, did not have a disparate impact on blacks. As we have repeatedly shown, the evidence is clear that Furnco's hiring system resulted in the hiring of black bricklayers far in excess of their statistical presence in the relevant labor market.[20] In turn, Respondents have not shown that our statistical analyses are wrong or our calculations erroneous. They offer no response to the indisputable fact that the actual number of black bricklayers employed on the Interlake job was nearly 14 standard deviations *greater* than the expected number (Petitioner at 43). Rather, they advance a series of arguments,[21] none of which has been upheld by any court in this case, and all of which are, to say the least, premised on a strained reading of the record.

For example, Respondents seek to divide the hiring on the Interlake job into two time frames, prior to October 10 and thereafter, claiming that the hiring of blacks after that date was done "under threat of litigation." (Respondents at 46.) Evidentiary support for the claim that additional blacks were hired after October 10 "under threat of litigation" is wholly absent from the record. For example, there is no evidence that

20. Petitioner at 40-45.

21. Respondents argue that the issues emanating from *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), are not properly before this Court (Respondents at 35-37). Notably, however, the entire thrust of their claim regarding Respondent Nemhard (Respondents at 20-25) is premised on *Griggs*. This inconstancy is part and parcel of Respondents' inability throughout the long course of this litigation to articulate a coherent and consistent theory as to just how Furnco discriminated against any of the plaintiffs in this case.

Petitioner had received any discrimination charges relating to the Interlake job at any time the job was in progress. Moreover, Furnco's General Manager, John Wright, testified without contradiction that he had no knowledge that any of the *Batiste* plaintiffs were seeking work on the Interlake job (R. 702-04). The evidence is plain, as found by the District Court, that Wright had called Dacies with the names of these plaintiffs "as a show of good faith." (R. 678; C. A. at A16; Findings ¶ 10.) Finally, Respondents' claim that Furnco hired such persons under threat of litigation is a particularly curious one considering that Respondents alleged in their amended complaint that the very reason the *Batiste* plaintiffs were not hired earlier was because of their threatened litigation (A. at 14, ¶ 12).

Even assuming that the time period on the job could be so dissected,[22] the evidence reveals that including October 10, 806 man-days were worked by bricklayers, of which 92 were worked by black bricklayers (Def. Ex. 22; R. 621-22). Thus, as of October 10, 11.4% of the man-days worked on the job were worked by black bricklayers, double the percentage of black bricklayers in the relevant labor market and *seven* standard deviations *greater* than the expected number.

One final point should be made about Petitioner's statistics. Our statistical showing that 5.7% of the bricklayers in the relevant labor market were black was derived from an analysis made by the Office of Federal Contract Compliance Programs (OFCCP) and covers the period of 1969 through 1973.[23] Such

22. Such a dissection of hiring by selected time frames was specifically rejected by the Fourth Circuit in *Roman* v. *ESB, Inc.*, 550 F. 2d 1343, 1352-53 (4th Cir. 1976).

23. Respondents assert that Petitioner's figures are derived from the 1969 Chicago Plan (Respondents at 47, n. 76). Respondents are plainly wrong. The Chicago Plan introduced into evidence (Def. Ex. 21; R. 618-20) is dated December 27, 1973 and the figures therein are "based on the evidence adduced at the hearing [September 25 and 26, 1969] and upon other information subsequently obtained by the Department [of Labor] . . ." (Def. Ex. 21

(Footnote continued on next page.)

OFCCP statistics deserve considerable deference, both as to the issue of the relevant labor market[24] and the percentage of minority workers in any craft or job category therein, as it is the administration agency charged with administration of the applicable Department of Labor regulations. *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). Consequently, the courts have consistently shown such deference to determinations made by the OFCCP in regard to various hometown plans.[25]

Under the rule of deference to agency fact-finding then, the OFCCP's definition of the relevant labor market for bricklayers in the Chicago area as being the Chicago SMSA is presumptively appropriate.[26] Plainly, the District Court's findings as to the

(Footnote continued from preceding page.)

at 278). Even if the figures were from 1969, however, their validity and probative value would not be undermined. *Cf. Hazelwood School District* v. *U. S.*, 97 S. Ct. 2736, 2742-44 (1977) (comparison of 1970 labor market census of teachers with school district's hiring of teachers in 1972-73 and 1973-74).

24. Section 201, Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), authorizes the Secretary of Labor to develop rules and regulations to prevent racial discrimination by Federal contractors. The Secretary, in turn, has delegated this task to the Office of Federal Contract Compliance Programs (OFCCP). 41 C. F. R. § 60-1.2 (1977).

The OFCCP thus has the responsibility and the authority to establish area-wide hometown plans for the construction industry. *See, e.g.*, the Washington Plan, 41 C. F. R. § 60-5 (1977), the Atlanta Plan, 41 C. F. R. § 60-8, (1977), or the Chicago Plan, 41 C. F. R. § 60-11 (1977). For each such plan, the OFCCP must first define the relevant labor market. 41 C. F. R. § 60-2.11 (1977).

25. *See Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir.), *cert. denied*, 404 U. S. 854 (1971) (Philadelphia Plan); *Rosetti Contracting Co., Inc.* v. *Brennan*, 508 F. 2d 1039 (7th Cir. 1974) (Chicago Plan); *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (D. C. Cir. 1973) (Washington, D. C. Plan); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (D. N. J. 1970) (Newark Plan).

26. This is particularly true since the use of SMSA statistics has been widespread in civil rights cases. *See, e.g., Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974); *Stone* v. *FCC*, 466 F. 2d 316 (D. C. Cir. 1972); *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257 (4th Cir.), *cert. denied*, 429 U. S. 920 (1976);

(Footnote continued on next page.)

percentage of black bricklayers in the relevant labor market are controlling here.[27]

B. Reference to Dacies' Alleged "List" Totally Misconstrues the Relevant Inquiry in This Case.

Last of all, there are the claims emanating from Dacies' purported "all-white list."[28] As we have noted previously the indisputable fact in this case is that at the time the job began and indeed throughout the entire job, Dacies hired from an integrated list—a pool of bricklayers, both black and white.[29]

(Footnote continued from preceding page.)

Taylor v. *Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975); *EEOC* v. *duPont Co.*, ... F. Supp. ....., 16 FEP Cases 847 (D. Del. 1978).

27. As this Court has held, the determination of the percentage of minority employees in the relevant labor force is particularly the province of the District Court. *Hazelwood, supra*, 97 S. Ct. at 2747. The District Court's rejection of Respondent's statistical showing herein was plainly proper, particularly given the defective manner in which such statistics were obtained (Petitioner at 41, n. 36). The Seventh Circuit, in taking a contrary view, never explained how such defects could be ignored.

28. Principal in this regard is Respondents' assertions that, left on his own, Dacies would have hired no blacks, or as they put it, "an 'inexorable zero.'" (Respondents at 29.) To call such an assertion speculative is merely to state the obvious. Moreover, the record suggests the opposite. For example, on the 1969 U. S. Steel job, prior to any affirmative action program by Furnco, Dacies hired black bricklayers (R. 875). Thus it is equally valid to conclude that left on his own, Dacies would have hired blacks. Irrespective of this, Dacies is not on trial here, Furnco is. To be sure, Furnco is responsible for Dacies' conduct on the Interlake job, but that conduct cannot be viewed in a vacuum. Dacies was under specific instructions regarding the hiring of bricklayers on the Interlake job, which instructions he carried out and which resulted in an integrated work force with minority hiring substantially in excess of black representation in the relevant labor market. Respondents seek to portray Dacies as a bigot. The record, however, does not support that assertion. For example, Respondent Smith, who has known Dacies for over a decade, testified unequivocally that Dacies had never exhibited any racial prejudice toward him (R. 345). Such an attack should be given short shrift by this Court.

29. Petitioner at 34. Respondents assert that this is the first time we have ever taken this position (Respondents at 38). This is

(Footnote continued on next page.)

Respondents, however, seek to subdivide Furnco's hiring process in order to avoid the unalterable fact that blacks were not only hired throughout the entire period of the job and on the average, worked the same number of days as whites, but that Furnco's hiring on this job was designed to and accomplished the hiring of black bricklayers far in excess of their statistical presence in the relevant labor market.

Other than a string citation, the only case cited by Respondents on this issue is *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974). That case concerned, *inter alia*, an employer with a historic practice of discrimination against blacks[30] which administered tests having a disparate impact on the advancement of blacks and which had a discernible impact upon black incumbent employees. Such tests, the court found, "had the impermissible result of confining black employees to the labor department." 491 F. 2d at 1373.[31] Here, of course, even assuming *arguendo* the existence of an "all-white list," there is no showing that Furnco's hiring policies had any disparate impact on black applicants.

As we demonstrated in our prior Brief, a hiring process cannot be parsed into its sub-parts. Such a claim has been uniformly rejected by the courts and is at odds with the proposed uniform federal guidelines (Petitioner at 33-39). More-

(Footnote continued from preceding page.)
patently untrue. Before the Court of Appeals, both in our initial brief (at 31) and in our brief in support of our petition for rehearing (at 9-10), we made this point.

30. Respondents allege that Furnco did not hire blacks prior to 1969 (Respondents at 4). In doing so, they do not refer to a single job performed by Furnco prior to 1969, nor to a single instance in which it was shown that Furnco violated any employment discrimination law. Indeed, in the only adjudication resulting from the *Batiste* litigation, Furnco was found not to have discriminated. *See* note 6, *supra; see also* Errata at ¶ 1.

31. Moreover, in *Johnson*, the Fifth Circuit specifically rejected the employer's statistical claims, finding the employer had too narrowly defined both the relevant labor market and affected class. In sharp contrast, Furnco's statistical showing herein is not open to question.

over, Respondents' theory is utterly untenable. Under it an employer would be precluded from utilizing any source for applicants—irrespective of its total recruitment efforts—that did not precisely duplicate the racial, ethnic and sexual mix of the relevant labor force. For example, an employer who recruited at predominantly white colleges would violate Title VII even though it also recruited at predominantly black colleges and the evidence demonstrated that in terms of applicant flow data and ultimate hiring there was no disparate impact on blacks. Is a law firm barred from recruiting at law schools that do not precisely reflect the appropriate percentage of minority law students, even though its overall hiring results in minority representation in excess of minority availability in the relevant labor market? Is an employer prohibited from running a help wanted ad in a newspaper that primarily reaches white readers, even though it similarly advertises in a newspaper that primarily reaches black readers?

The implications of Respondents' position are staggering. Assume, as is the case throughout American industry, that an employer utilizes a variety of sources to recruit employees—employment agencies, newspaper ads, its own recruiters, walk-ins and referrals. In Respondents' view, if any one of these sources does not precisely reflect the composition of the relevant labor force for men, women, blacks, Hispanics or any other protected group, then use of that source by an employer is discriminatory vis-a-vis the under-included group, irrespective of the fact that the total recruitment and hiring effort of the employer has no disparate impact. Respondents' view is all the more curious in the context of this case in that there is no evidence whatsoever that any "open" hiring system would have led to an increase in black hiring on this job, let alone accomplish Furnco's business needs (Petitioner at 26-33, 43-45).

Consideration of Furnco's total hiring system is clearly mandated by the case law. Respondents try to distinguish the numerous testing cases cited by Petitioner claiming that an

applicant in such cases could overcome the poor showing on one sub-part by a better showing on another. But this distinction is frivolous. Here, even assuming *arguendo*, that blacks were excluded from one source of being hired, plainly they were included under other sources.

Dacies testified that, in fact, he utilized as one source in seeking qualified fire bricklayers the "various notes" he keeps containing the names of bricklayers he had worked with in the past and whom he knew were experienced and competent (R. 769). He also testified that he knew the names of black bricklayers with whom he had worked and hired them. *See* note 12, *supra*. Additionally, he obtained names of other experienced and competent fire bricklayers, including the names of blacks, from Furnco's General Manager, another Furnco superintendent, his foreman and a bricklayer already working on the job (R. 770, 778). Having one's name on Dacies' "list" was obviously not a prerequisite to being hired for the Interlake job, but was one of several sources Dacies utilized to staff the job. And, as our prior discussion of Respondent Smith's claim well demonstrates, purported exclusion from Dacies' "list" resulted in no disparate treatment. *See* pages 7-12, *supra*.

To look at it another way, even assuming, *arguendo*, the existence of an "all-white list," it was not the exclusive means of being hired and persons purportedly excluded from that "list" were nonetheless hired and hired in a nondiscriminatory sequence. Failure to be included on the alleged "list" (to pass a sub-part of a test) could be overcome by inclusion through another referral source (the ability to pass another sub-part of the test).

Respondents argue that acceptance of our position means that an employer could fill most "of its positions by administering a non job-related test which only whites could pass" and then fill "the remaining positions with other blacks who had never applied for the job or taken the test." (Respondents at 44.)

Whatever the results in such a farfetched hypothetical, that is plainly not the case here.[31] The evidence is plain that Furnco's hiring policies were designed both to obtain experienced and competent fire bricklayers and to assure racial integration of its work force. The names of bricklayers on Dacies' purported "list" were not names out of a telephone book, but were bricklayers skilled in firebrick work and known by Dacies to be experienced and competent in this specialized skill. The same criteria—known competence, experience and skill in firebrick —were applied to all other bricklayers hired from other sources. Even in the Amici's view, these criteria were job-related.

To be sure application of these criteria and Furnco's hiring policies—particularly its refusal to accept applications—precluded consideration of all applicants. Critically, however, such policies were not racially premised; rather, they were designed not only to meet Furnco's business needs, but to assure the hiring of black bricklayers far in excess of their presence in the relevant labor market. Furnco's hiring policies excluded from consideration an entire universe of bricklayers, but that universe outside the gate was both black and white.

III.

THE OTHER CONTENTIONS OF RESPONDENTS ARE UNAVAILING.

We do not intend to respond at length to Respondents' comments as to the District Court Judge's conduct of the trial. We do not believe that issue is properly before this Court. Certainly, the Court of Appeals did not view Judge Austin's conduct of the

31. It is anomalous that Respondents claim that our position herein "would prevent minority employment from rising above its proportion in the area work force" (Respondents at 44) when the District Court found—and the statistical analysis demonstrates (Petitioner at 39-45)—that "Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market." (C. A. at A20; Conclusions ¶ 4).

trial to be such as to eviscerate the clearly erroneous rule. Indeed, that court applied that standard to numerous findings of the District Court (C. A. at A3—Gilmore; A4—Williams; A5—Hawkins and Pearson; 551 F. 2d at 1087-88).[32] Further, Respondents' attempts to pick and choose random comments of Judge Austin without consideration of the context in which such remarks were made or review of the record as a whole are plainly improper.

As for the claim that Petitioner has gone beyond "the questions presented," we would only state that our initial Brief fully comports with the questions presented and issues raised in our Petition For Certiorari and Respondents' claims are a last gasp effort to have this Court avoid reaching the issues before it.

CONCLUSION.

It is interesting to note that neither the Respondents nor the Amici attempt to adopt the opinion of the Seventh Circuit Court of Appeals or propose that it be adopted by this Court. Instead, both turn to new theories, never adopted by that court, to bolster the results reached below.

In this regard, Petitioner submits that the findings and conclusions of the District Court were totally justified both on the basis of the entire record and when evaluated against the relevant applicable law. In light of the foregoing and Petitioner's prior Brief, we respectfully request that this Court enter an Order reversing the decision of the Court of Appeals as to Respondents Nemhard, Smith and Samuels, and affirming the decision of the District Court.

32. Having properly applied the clearly erroneous rule in regard to the dismissal of the claims of several plaintiffs, the Seventh Circuit's abandonment of it, without explanation, to construct its own "feasible" hiring system was improper and is before this Court. *See* Petition For Writ of Certiorari at 2, Question 3.

Respectfully submitted,

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APPENDIX

ERRATA

1.

The Claim: Prior to 1969, Furnco had never hired a black bricklayer (Respondents at 4).

The Record: This claim is based entirely upon the testimony of Plaintiff William Waters purportedly that Furnco's superintendents Urbanski and Larkin had so testified before the Illinois FEPC (R. 514). On cross-examination, however, this assertion was dissipated. Waters acknowledged that he did not remember the exact words of the FEPC testimony (R. 529), that it was a long time ago (R. 530), that "I am not positive [of the testimony]", and finally he admitted "I am not sure [what was said]." (R. 531). When pressed, he flatly admitted that he had no knowledge at all (R. 532):

> "Q. [by Mr. Kaplan] Is it fair to say that you have no knowledge as to whether or not Furnco employed blacks prior to 1969 on the basis of firsthand personal knowledge?
> "A. [by Mr. Waters] No, not if you are going to say firsthand personal knowledge, no."

Additionally, there is no evidence in the record that Furnco performed any jobs at all in the Chicago area prior to 1969. Certainly, Respondents did not introduce any such evidence. In 1969, Furnco performed the U. S. Steel job, during which 12 of the 94 non-supervisory bricklayers employed were black, or 13 per cent (Defendant's Answers to Interrogatories filed February 16, 1978—Answer No. 8).

Finally, reference to Larkin's testimony before the Illinois FEPC (Respondents at 4, n. 3: 21, n. 34) is plainly improper. The transcript of that testimony does not appear in the record

in this case and was never introduced nor admitted before the District Court. As such, it is not properly before this Court. *New Haven Inclusion Cases*, 399 U. S. 392, 499 n. 66 (1970). If it had been introduced, it would have shown that Urbanski testified: "I have had black bricklayers on [Furnco] jobs before." (Tr. 190).

2.

The Claim: "The record strongly suggests that Smith was rejected in August precisely because he might have referred other blacks. Smith testified, and Dacies did not deny, that when Smith asked Dacies why he had been hired only toward the end of the job, Dacies replied 'if you [had gotten] off to yourself away from the other fellows, I would have hired you'. (Tr. 334.) Nemhard, of course, was one of 'the other fellows'." (Respondents at 32; *see also* Respondents at 20, n. 33).

The Record: There is no evidence at all as to who "the other fellows" were, as made clear by the rest of Smith's testimony (R. 334):

"By Mr. Miner:

"Q. Who are you referring to as 'the other fellows'?
"A. Well, he didn't say. He just said 'other fellows.'
"Mr. Kaplan: Objection.
"The Court: Well, he didn't say.

"By the Witness:

"A. He didn't put no individual out, he just said 'other fellows.'
"The Court: All right, that is clear now. He didn't say."

3.

The Claim: Furnco operated a dual hiring system where whites were "individually recruited" and blacks "had to learn of their secret vacancies through rumor and surmise." (Respondents at 5.)

The Record: There is no record citation to this claim since it is unsupported by the record. On the contrary, Furnco General Manager testified at length as to the manner in which bricklayers—both black and white—are hired by Furnco (R. 668-72). Moreover, the evidence is plain that, for example, Respondent Smith, a black bricklayer, had been recruited to work for Furnco on a prior job (R. 346, 366).

4.

The Claim: Respondents were improperly denied the opportunity to present evidence as to industry practice (Respondents at 5, n. 6).

The Record: Respondents' first witness, Nicholas Popovic, testified extensively on direct examination as to the hiring practices in the industry (R. 35-39). Moreover, six of the eight Plaintiffs testified that industry practice, in accordance with Furnco's, is to be contacted by contractors with whom they had previously worked regarding work on other jobs without ever seeking work at the job site (R. 138-Nemhard; R. 273-Samuels; R. 346, 366-Smith; R. 402-403-Williams; R. 537-Waters; R. 584-85-Pearson). Pearson testified that this is the "typical" way of obtaining work (R. 585).

5.

The Claim: Two black bricklayers (Jones and Alston) were not, in fact, hired, but were merely transferred from another Furnco job to the one at Interlake (Respondents at 7, 8, n. 14).

The Record: The claim that R. D. Jones and Joseph Alston were transferred to the Interlake job is one that recurs throughout Respondents' Brief and is clearly erroneous. Dacies testified that he hired Alston on the recommendation of Urbanski (R. 781) and that he had hired Jones because Jones had worked for him at U. S. Steel in 1969 (R. 783). In neither case did Dacies testify that either was transferred from another Furnco

job. The District Court credited Dacies' testimony as to how he had hired (C. A. at A15; Findings ¶ 8).

Jones testified that he was transferred by Charlie Larkin from Furnco's Bethlehem Steel job to the one at Interlake (R. 913). On cross-examination, however, he could not recall when he worked on either job (R. 915). At one point he testified that he was hired for the Interlake job in September 1972 (R. 917), and at another point he testified that he was laid off from the Interlake job in March 1972 (R. 916). Such testimony is incredible since the job began and ended in the Fall of 1971. Moreover, Furnco's records (Pl. Ex. 10; R. 920-21) reveal that Jones worked on the Bethlehem job for only one week, in March 1971, and hence, could not have transferred to the Interlake job which began in late August 1971, and that Larkin wasn't even on the Bethlehem job.

On the basis of Plaintiffs' Exhibit 10—and only on that basis—Respondents assert that Joseph Alston was transferred to the Interlake job because he had worked on the Bethlehem job until September 7, and was hired on the Interlake job on September 14. Respondents ignore the fact, supported by Dacies' testimony, that Alston was laid off from the Bethlehem job on September 7 and hired later by Dacies on September 14 for the Interlake job without any transfer whatsoever.

In any event, Respondents cannot have it both ways. If they rely on Plaintiffs Exhibit 10, it shows Jones was not transferred, and if they don't, they can't claim Alston was. The plain fact is, however, that neither was transferred.

6.

The Claim: The District Court "erroneously denied the Plaintiffs' offer of [Exhibit 10]." (Respondents at 8, n. 14).

The Record: As noted above, Plaintiffs' Exhibit 10 was the list of bricklayers employed by Furnco on a job it performed in Indiana for Bethlehem Steel. Respondents attempted to have

this exhibit introduced through Respondent Smith on the issue of the racial composition of the bricklayers employed on that job and another Furnco job performed in Indiana (Pl. Ex. 9). Although Smith was able to identify some of the bricklayers as black, in regard in Plaintiffs' Exhibit 9, he could not testify as to the racial composition of the other bricklayers (R. 378):

> "The Court: Are you saying that you know that the rest of them are not black?
>
> "The Witness: No, I don't."

Plaintiffs' Exhibit 10 was similarly defective in that Smith could not testify as to the racial composition of the work force (R. 384-85). Thus, Smith admitted that he knew for sure that there were four blacks working on the job and the following colloquy ensued (R. 384-85):

> "The Court: Are you willing to testify under oath that there were no more than four blacks working on that job?
>
> "The Witness: No, sir, I am not. There were three more and I don't know their names."

In short, Plaintiffs' Exhibits 9 and 10 were introduced to prove the racial composition of the work force on prior Furnco jobs, Smith could not identify which bricklayers were white and which were black, and Judge Austin properly excluded both exhibits.

7.

The Claim: "Dacies had never hired a black prior to the Interlake job." (Respondents at 14.)

The Record: On the contrary, Dacies testified without contradiction, that he, in fact, had hired two black bricklayers on the U. S. Steel job in 1969 during the short period of time that he worked on that job (R. 875).

8.

The Claim: "Only blacks sought to apply for work at the gate." (Respondents at 14.)

The Record: There is testimony that blacks attempted to apply at the gate, but certainly none that they were the only ones to so attempt to apply in that manner. There is also evidence that whites appeared at the gate (R. 194, 257). In fact, there is evidence that at least one white bricklayer—Thomas Matusek—sought work by appearing at the job site gate. Matusek was one of Plaintiffs' witnesses listed in the pre-trial order (Pre-trial Order at 11). Matusek was not called to testify by Plaintiff; and not called by Defendant because no evidence was ever introduced before the District Court that "only blacks sought to apply for work at the gate." Matusek's deposition, however, is part of the certified record before this Court and we refer to it because of this new assertion by Respondents. In his deposition, Matusek, a white bricklayer, testified that he had sought work on the Interlake job by going to the gate, but had not been hired (Dep. of Thomas Matusek at 19, 20):

"Q. [By Mr. Kaplan] Do you ever go to the gate to be hired as a bricklayer?

"A. [By Mr. Matusek] Yes. One time when Furnco had that job over there at Interlake.

"Q. What happened then–

"A. I wasn't hired.

* * * * *

"Q. You went to the gate at the Interlake job in 1971?

"A. Geez, I would say in that area, yes.

"Q. The job that was performed between August and November of '71?

"A. Yes."

9.

The Claim: "Dacies' behavior toward the blacks who applied at the gate was deceitful, hostile and evasive." (Respondents at 23).

The Record: Dacies' testimony, as credited by the District Court, was that other than Smith, he talked to no bricklayers—white or black—at the gate (R. 786-87; C. A. at A17; Findings ¶ 14). There is not a scintilla of evidence that whites who appeared at the gate were treated in any manner differently than blacks.

10.

The Claim: "Dacies testified on cross-examination that he could not recall whether he had ever telephoned a single black during the Interlake job. (Tr. 877)." (Respondents at 39.)

The Record: Dacies testified that although he did not recall exactly, "I may have." (R. 877). That Dacies, in fact, called black bricklayers is clear from Respondents' own testimony. Thus Smith testified: "Joe Dacies called me one night and told me to come to work [on the Interlake job], report to work the next morning." (R. 328, 350-51). And, then there is the testimony of Willie Pearson:

"Q. How were you hired [on the Interlake job]?

"A. Mr. Dacies called me on the phone." (R. 571.)

11.

The Claim: Prior to October 10, blacks constituted only 5% of the hires and this is consistent with the fact that only 3.5% of the bricklayers hired on two prior Furnco jobs were black (Respondents at 46, n. 75).

The Record: The claim that only 5% of the bricklayers hired prior to October 10 were black is erroneous. It is premised on the allegation that two of the four blacks hired prior to that

date were transferred, which we have shown is unsupported by the record (Errata at ¶ 5). In fact, 11.4% of the man-days worked prior to October 10 were worked by black bricklayers (Def. Ex. 22; R. 621-22).

Similarly unsupported by the record is the claim that only 3.5% of the bricklayers on the two prior Furnco jobs were black. This claim is premised on Plaintiffs' Exhibits 9 and 10 which were rejected by the District Court precisely because the racial composition of the work force could not be verified (Errata at ¶ 6). Respondents' current reliance on these exhibits is particularly curious because when Defendant's counsel sought to cross-examine R. D. Jones on the basis of Plaintiff's Exhibit 10, Respondents' counsel objected on the basis that "It has never been verified." (R. 922).